IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 2007 Session

ARTHUR LEE JONES A/K/A ARTHUR LEE BROCKINGTON v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Montgomery County
No. 40500504 Michael R. Jones, Judge

No. M2006-01835-CCA-R3-PC - Filed July 17, 2007

The Petitioner, Arthur Lee Jones A/K/A Arthur Lee Brockington, pled guilty to one count of aggravated assault and was incarcerated in the Tennessee Department of Correction. In his petition for post-conviction relief, he alleged that the indictment in this case was defective, and he was not afforded the effective assistance of counsel prior to entering his guilty plea. The post-conviction court denied the petition after a hearing. On appeal, the Petitioner raises the same issues and additionally argues the post-conviction court violated Tennessee Code Annotated section 40-30-105(b), thereby violating the Petitioner's due process rights. After a thorough review of the facts and applicable law, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Kathryn B. Stamey, Clarksville, Tennessee, for the Appellant, Arthur Lee Jones A/K/A Arthur Lee Brockington.

Robert E. Cooper, Jr., Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; John W. Carney, District Attorney General; and Helen Young, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

The acts leading to the Petitioner's guilty plea to aggravated assault occurred on May 31, 2001. The Montgomery County Grand Jury returned a presentment in October 2001. A capias was issued on October 3, 2001, and the Petitioner finally appeared in a Tennessee court on May 26, 2005, after being extradited from out-of-state. Trial counsel ("Counsel") was appointed on that date, after which the Petitioner filed a number of pro se motions, including a motion for discovery, a motion

for a speedy trial, and a motion to dismiss. These pro se motions were never heard by the trial court, and on August 5, 2005, the Petitioner pled guilty to aggravated assault. No appeal was filed.

The Petition for post-conviction relief was filed on March 9, 2006, and a hearing was conducted on August 7, 2006. The following evidence was presented at that hearing: The Petitioner testified that he asked Counsel to file motions on his behalf, but Counsel declined to do so. As a result, the Petitioner filed the motions pro se, but they were never heard by the trial court. The Petitioner appeared in court on August 5, 2005, for what he believed was an opportunity to have his motions heard. Instead, Counsel notified him that a deal had been reached, and there was no need to address the motions. The Petitioner testified that he was confused, but he went ahead and pled guilty. He said, however, that he requested that Counsel file an appeal, which was not done.

On cross-examination, the Petitioner testified that, although the trial court explained to him that he was waiving his right to appeal, he felt forced to accept the guilty plea. The Petitioner knew he had a right to a trial, but he stated "why would I take something to trial that I know I was involved in?" The Petitioner also denied the proceedings were instituted against him in October of 2001. He claimed he did not learn of the charges until February 2004.

Counsel testified that the Petitioner did send him motions, but he declined to file them because they were not strategically necessary. Counsel stated he believed there was no merit to the statute of limitations claim because the presentment was issued in October 2001. Counsel stated that he did not ever recall the Petitioner asking him to file an appeal because "had he done so it would have stuck in [his] mind, because it would have been decidedly odd." Additionally, Counsel could not find in his file a letter requesting an appeal.

On cross-examination, Counsel stated that he never tells clients they have to plead guilty as that would be unethical. Counsel received discovery from the State, and Counsel was never asked to file a motion to set aside the guilty plea.

The trial court determined that the presentment was issued in October 2001, and, therefore, the statute of limitations had not run on the aggravated assault charge. The trial court also found no proof was introduced with relation to the unfiled speedy trial motion, and no prejudice was alleged. Further, the trial court found the "indictment" was not defective because it was not an indictment but a presentment. The trial court also determined the Petitioner did not request Counsel file an appeal. As such, the petition for post-conviction relief was denied.

II. Analysis

On appeal, the Petitioner alleges that: (1) the post-conviction court was statutorily barred from hearing the petition under Tennessee Code Annotated section 40-30-105(b) because it was the original trial court, and his due process rights were thus violated; (2) his conviction was based on a defective indictment; and (3) he did not receive the effective assistance of counsel.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

The Petitioner's first contention is based on Tennessee Code Annotated section 40-30-105(b). That statute states:

> At either the trial proceeding or an appellate proceeding reviewing the proceeding, the presiding judge of the appropriate court shall assign a judge to hear the petition. The issue of competence of counsel may be heard by a judge other than the original hearing judge. If a presiding judge is unable to assign a judge, the chief justice of the supreme court shall designate an appropriate judge to hear the matter.

T.C.A. § 40-30-105(b) (2006). We cannot agree with the Petitioner's reading of the statute. In our view, the statute does not prohibit the original trial judge from hearing the post-conviction petition, it merely states that a different judge from the original hearing judge may hear the issue of competency of counsel. The Petitioner is not entitled to relief on this issue.

The Petitioner's next contends that he was charged by an indictment that was not signed by the district attorney. *See* T.C.A. § 40-13-103 (2006) (requiring the district attorney's signature on indictments). Upon review of the record, we agree that the instrument does not appear to have been signed by the district attorney. However, we agree with the post-conviction court's finding that this was not an indictment, it was a presentment.

In considering this issue, we begin with the long-standing principle "that no person shall be put to answer any criminal charge but by presentment, indictment or impeachment." Tenn. Const. art. I, § 14. Although the most common method of initiating prosecution is an indictment, Tennessee law also allows for prosecution to commence by a presentment. *See State v. Street*, 768 S.W.2d 703, 713 (Tenn. Crim. App. 1988); David Louis Raybin, 9 Tenn. Prac., Crim. Prac. & Procedure, § 9.2 (2007). In fact, indictments and presentments are virtually identical in purpose. The general purpose of either instrument is to advise the accused of the offense with which he or she is charged. *See, e.g.*, *Stanley v. State*, 104 S.W.2d 819, 821 (Tenn. 1937).

We note that there are no specific constitutional or statutory requirements as to the form, manner, or method in which a presentment must be made. *See Stoots v. State*, 325 S.W.2d 532, 536 (Tenn. 1959); *State v. Mingledorff*, 713 S.W.2d 88, 88 (Tenn. Crim. App. 1986). The form of a presentment is often, by practice, sufficiently similar to the form of an indictment that the Tennessee code states that the use of indictment includes presentment "whenever the context so requires or will permit." T.C.A. § 40-13-101(b) (2006). "The presentment is in the form of a bill of indictment, and is signed individually by the grand jurors who returned it." *State v. Davidson*, 103 S.W.2d 22, 23 (Tenn. 1937) (quoting *State v. Darnal*, 20 Tenn. (1 Humphreys) 290 (1839)) (emphasis added). The primary difference between the *form* of an indictment and that of a presentment is that an indictment must be signed by the district attorney and endorsed by the foreperson of the grand jury, whereas a presentment must be signed by all of the grand jurors but need not be signed by the district attorney. *See Crumley v. State*, 174 S.W.2d 572, 573 (Tenn. 1943); *Garret v. State*, 17 Tenn. (9 Yerger) 389, 390 (1836); *State v. Hudson*, 487 S.W.2d 672, 675 (Tenn. Crim. App. 1972).

Applying those precepts to the case at bar, we conclude that the trial court did not err in finding that the charging instrument was a valid presentment. Although the document contains some information under the "Indictment" heading as opposed to the "Presentment" heading, the requirements for a presentment are present. The document was signed by twelve grand jurors and the foreman. Regardless of the lack of the district attorney's signature, the instrument satisfies the requirements of a presentment. Thus, the Petitioner is not entitled to relief on this issue.

As to the Petitioner's third issue, we note that the right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective

standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Id.* at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

Because, as stated above, the presentment was not defective, and the grand jury issued the presentment some five months after the acts, the statute of limitations had not run on the Petitioner's aggravated assault charge. *See* T.C.A. § 39-13-102(d)(1) (2006) (aggravated assault for serious bodily injury is a Class C felony); T.C.A. § 40-2-101(b)(3) (2006) (four-year limitation on prosecution for a Class C felony). Counsel was not defective in declining to raise this issue. As such, the Petitioner is not entitled to relief on this issue.

III. Conclusion

Based on the foregoing reasoning and authority, we affirm the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE